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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 831

FRANCIS EDDIE SPECHT, Petitioner

vs.

WAYNE K. PATTERSON, Warden, Colorado State Penitentiary; DR. CHARLES MEREDITH, Superintendent, Colorado State Hospital, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

In accordance with the Revised Rules of the Supreme Court of the United States, Rule 40.3, the items specified therein are not restated. This is not to say, however, that the statement of question in the opening brief complies with Rule 40.1 (d) (2), nor comports with the question presented to and determined by the court below. To avoid the necessity of detailed analysis, we will therefore treat, for the purposes of our argument, the question that is presented to this court for determination as the same which was presented to and determined by the court below. We do suggest, however, that the question presented can more precisely be stated as:

Does due process command that a sentencing statute must explicitly provide the attributes of due process which attach to a criminal trial or civil commitment proceeding?

or

Does a legislative enactment which is responsive to the demands of an enlightened approach to sentencing offend due process?

Likewise, we do not agree with petitioner's assertion contained in the statement of the case that petitioner was not afforded a hearing or his claims as to what did or did not occur at that hearing. No official record of his sentencing hearing or hearings exists and no evidentiary hearing has been held by any court as to what did or did not occur at his hearing to impose sentence and, therefore, any questions in regard thereto are not properly before this Court. We, therefore, treat such statements as arguments and not as statement of fact and will respond thereto in our argument.

For the purpose of brevity, we will refer to the Colorado "Sentencing of Sex Offenders" Act as the Act. Unless otherwise noted, the statutory references are to Colorado Revised Statutes 1963.

SUMMARY OF THE ARGUMENT

The question presented by petitioner can be succinctly stated as: Does a legislative enactment which is responsive to the demands of an enlightened approach to sentencing offend due process? The Colorado Act for "Sentencing of Sex Offenders" rejects punishment and retribution and substitutes in its place control and dis-

cipline. It supplants rigidity with flexibility; it offers rehabilitation and treatment in lieu of the suspended deep freeze of custody alone; a sentence which offers parole and discharge in lieu of a fixed period of custody. It is a sentence which is operative only upon standards in distinction to one fixed by the vehicle of a plenary, discretionary authority; a determination which is subject to the scrutiny of review in contradistinction to the orthodox conclusive sentence not subject to review.

Petitioner's basis of attack exhibits a fundamental misunderstanding of the "Sentencing of Sex Offenders" Act. The Act does not cause one's loss of liberty, but the conviction of a crime, in this case the crime of indecent liberties. The fact that the statutory section defining the crime of indecent liberties permits the imposition of a sentence and the subject Act permits the imposition of an alternative sentence is of no legal consequence. The two statutory provisions operate in pari materia as one statutory provision permitting imposition of either one or the other of alternative sentences, an operative effect which is substantially similar to that of USC § 4208(b). To say petitioner was entitled to due process begs the question. Pellucidly, petitioner is and was entitled to due process at all stages of his proceeding, including sentencing. To state the obvious, however, does not establish the validity of petitioner's hypothesis. Due process required upon sentencing does not take the form postulated by petitioner. The form of due process required at a hearing to impose sentence is "fair play." Whether petitioner was afforded such due process is not before the court in this case. Petitioner presented before the court below solely a question of substantive due process. Petitioner opined that the Act is "invalid" because it fails to prescribe the quali-

ties and attributes of due process demanded. The issue as to what was the nature of the hearing afforded petitioner has not been raised before, nor determined by, any court. We therefore, will limit our response to the only question properly before this Court — what attributes of due process must a statute providing for imposition of sentence explicitly guarantee to comport and be in harmony with due process.

ARGUMENT

I.

THE "SENTENCING OF SEX OFFENDERS" ACT PROVIDES FOR IMPOSITION OF A SENTENCE AND DOES NOT PROVIDE A CRIMINAL PROCEEDING TO CONVICT OR A CIVIL PROCEEDING TO COMMIT. CLEARLY, AT A HEARING TO IMPOSE SENTENCE, PETITIONER IS ENTITLED TO DUE PROCESS. HOWEVER, THE NATURE AND QUALITY OF RIGHTS WHICH PETITIONER ARGUES THAT AN ACT MUST EXPLICITLY GUARANTEE DO NOT APPLY TO SENTENCING. SINCE THE ACT DOES NOT PROVIDE A TRIAL, THE PANOPLY OF TRIAL DUE PROCESS RIGHTS DO NOT ATTACH. IT IS NOT REQUIRED THAT A SENTENCING STATUTE EXPLICITLY GUARANTEE RIGHTS WHICH DO NOT ATTACH. MEASURED BY THE APPLICABLE DUE PROCESS STANDARD, THE ACT IS CLEARLY A VALID SENTENCING STATUTE.

As a proper basis for our argument in response to petitioner's, it is apropriate to summarize the essential

statutory scheme of the "Sentencing of Sex Offenders" Act and the appropriate decisions construing same. The form of the statute in effect at the date of petitioner's sentencing was as is now expressed in Colorado Revised Statutes 1963, vol. 3, pp. 326 to 329, with one exception not relevant to the issues of this case.[1]

The declaration of purpose is:

> "For the better administration of justice and the more efficient control, treatment, and rehabilitation of persons convicted of the crimes of * * *."
> 39-19-1.

The sentencing provision may apply if:

> "... the district court is of the opinion that any such person, if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, * * *."

Prior to imposition, the court must cause a complete psychological examination of the defendant, receive a report thereof and cause a pre-sentence report to be prepared and filed with the court. 39-19-2; 39-19-5(4). When these conditions have been met, the defendant is brought before the court for arraignment or hearing for imposition of sentence. 39-15-5. In lieu of the alternative sentencing provision, the court in its discretion may grant probation or may impose the sentence provided by the Act, which is a minimum of one day and a maximum of life. 39-19-5(3); 39-19-2(1). The place of initial commitment is the state penitentiary. 39-19-5(1). Upon commitment, the defendant's case must be reviewed by the Parole Board within

[1] In 1963, CRS '53, 39-19-1, was amended to include unnatural carnal copulation and rape. Colo. Session Laws, 1963, Ch. 96, § 1.

six months and at least once a year thereafter. 39-19-6(2). The Parole Board is charged with the duty of determining the proper place of custody "to provide treatment or proper custody" and in furtherance of such duty may transfer or re-transfer a person to an appropriate institution. 39-19-2(2). The Board is further invested with the authority to parole, terminate parole, re-parole, and

> ". . . to issue an absolute release from confinement to any person sentenced under the provisions of this article at such time and under such conditions as the interest of justice and the welfare of society may dictate. . . ." 39-19-7.

The Act provides a sentence and hearing for imposition of sentence. It does not provide a basis for commitment or loss of liberty. Nor is this statute a so-called "sexual psychopath" statute. The commitment or loss of liberty is founded upon conviction of a crime. The statutory section which defines the corpus delicti of the crime with which a defendant is charged and the Act are construed in pari materia "and must be interpreted together." *Sutton v. People*, 156 Colo. 201, 397 P. 2d 746, 747 (1964). The sentencing provision of 40-2-32 and the Act are not separate and distinct, but operate together as one. It is an operative, legal effect which permits the sentencing court to impose one or the other sentence in its discretion.[2] In effect, the sentencing court, upon hearing to impose sentence, has three alternatives. They are (1) to grant probation; (2) to impose a sentence within the limits specified by 40-2-32; or (3) impose a sentence pursuant to the Act.

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[2]An operative effect which is substantially similar to that provided by 18 USC 4208(b).

The Act was in effect at the time petitioner committed the act which gave rise to the charge. Upon conviction, defendant was not subject to the sentence provided by CRS 1963, 40-2-32, but was subject to one or the other, the same as if the alternative sentence was provided in 40-2-32. " 'But, upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime. . . .' " *Specht v. Patterson*, 10th Cir., 357 F.2d 325, 326 (1966). A hearing under the terms of the Act, therefore, obviously is not one to convict, but one to impose sentence — a sentence which is imposed in the discretion of the trial court.[2] It is a discretionary decision, which is based upon and measured against the standards and classifications provided and is a determination subject to scrutiny upon review. See *Ray v. People*, ... Colo. ...., 415 P.2d 328 (1966), and *Hawkins v. People*, 131 Colo. 281, 281 P.2d 156 (1955).

It goes without saying that a hearing to impose sentence must be conducted in accordance with the commands of due process. But what are the attributes of due process which attach to a hearing on imposition of sentence? Very obviously, it is not the panoply of rights which attach to a criminal trial to determine guilt or a civil trial which results in one's commitment.

This Court has clearly enunciated the nature and quality of due process which attaches to a hearing to impose sentence. Foundational to a discussion of this point is the statement of this Court in *Townsend v. Burke*, 334 U.S. 736, 92 L.ed. 1960, 68 Sup. Ct. 1252 (1948):

". . . It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the

[2]See Appendix A.

careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, *based on a scrupulous and diligent search for truth,* may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading or court records, *a requirement of fair play* which absence of counsel withheld from this prisoner." 334 U.S. 741. (Emphasis supplied.)

Dispositive of the question presented are the following statements of this Court in *Williams v. New York,* 337 U.S. 241, 93 L.ed. 1337, 69 Sup. Ct. 1079 (1949):

". . . Here, for example, the judge's discretion was to sentence to life imprisonment or death. To aid a judge in exercising this discretion intelligently the New York procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. *The sentencing judge may consider such information even though obtained outside the courtroom*

from persons whom a defendant has not been permitted to confront or cross-examine. It is the consideration of information obtained by a sentencing judge in this manner that is the basis for appellant's broad constitutional challenge to the New York statutory policy. 337 U.S. 245.

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". . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has ben determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. *And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.*

"Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime . . . . *The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offense.* . . . 337 U.S. 247.

". . . We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information

concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues. 337 U.S. 250.

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". . . The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts-state and federal-from making progressive efforts to improve the administration of criminal justice. 337 U.S. 251.

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". . . We hold that appellant was not denied due process of law." 337 U.S. 252. (Emphasis supplied.)

Also apropos is the following statement from *William v. Oklahoma*, 358 U.S. 576, 3 L.ed. 2d 516, 79 Sup. Ct. 421 (1959):

". . . But we go on to consider this Court's opinion in Williams v. New York, 337 US 241, 93 L.ed. 1337, 69 S Ct 1079. *This Court there dealt with very similar contentions and held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and*

to the convicted person's life and characteristics." 358 U.S. 584. (Emphasis supplied.)

It is clear, therefore, that at a hearing to impose sentence the trial court may consider hearsay evidence provided that the informational process is designed to elicit the truth. It has not been required that a defendant be *guaranteed* the opportunity to confront the sources of information and compulsory process to compel attendance of witnesses on his behalf. Since the attributes of trial due process, which petitioner demands, are not required, obviously a sentencing statute which does not provide that which is not required does not run afoul with due process.

What may or may not be required under the multitudinous situations which may arise in sentencing to fulfill "fair play" is not a justiciable issue in this case. Repetitiously, what occurred at petitioner's hearing is not before this Court. Due process may require that defendant be given a copy of the psychiatrist's report and the presentence report.[4] It can be said that, unless such is done, no adequate opportunity to test the veracity of the informational process is afforded. Under the possible variables which may arise, a request for a hearing and the right to compulsory process may be appropriately addressed to the trial court; that is, when necessity arises to test the verity of the informational process, correct or add to same. However, any such discussion or delineation in this case is academic.

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[4]But see Fed. Rules Cr. Pro., Rule 32, as amended February 28, 1966, which provides that disclosure is only permissive. . See also 18 USCA, Rule 32 (Supp.); notes of advisory committee on rules for citation of comments, both pro and con. Also pertinent is the following comment: "The Commission recommends: In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." THE CHALLENGE OF CRIME IN A FREE SOCIETY — A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 145.

We are concerned, in this case, only with a statute which permits imposition of an alternative sentence. Must it provide explicitly, by words and phrases, that any information utilized to determine sentence be proven by the rules of evidence applicable to a trial and that the defendant has the right to compel the attendance of witnesses, etc.; and if it does not, due process requires it to be held "invalid"? Such a fixed, static concept of due process does not apply to a hearing for imposition of sentence. This Court's decisions in *Townsend, Williams v. N.Y.*, and *Williams v. Oklahoma* dispose of this contention adversely to petitioner.

The Act is not one which thwarts due process, but fulfills due process. How can due process be offended by a sentence which is responsive to an enlightened approach to sentencing? It substitutes control and discipline for punishment and retribution. "Certainly, control of the person must be assured before treatment and rehabilitation is undertaken." *Trueblood v. Tinsley*, 148 Colo. 503, 366 P. 2d 655, 658 (1961). It supplants rigidity with flexibility; it makes available, through the vehicle of Parole Board transfer, the full range of state facilities; and parole and discharge are available at the time rehabilitation is effected. It is a sentence which offers treatment and rehabilitation in lieu of the deep freeze of a fixed period of custody. Further, its imposition is determined on the basis of standards as opposed to conclusive plenary discretion without standards.[5] Finally and equally significant, the imposition is subject to the scrutiny of appellate review in contradiction to the orthodox Colorado sentence which is imposed within the plenary and conclusive dis-

[5]See Appendix "B".

cretionary authority of the trial court.[6] The fact, therefore, that it responds to the enlightened approach to sentencing does not transform it into a different type of proceeding than it is. It still remains what it in fact is — a statute which permits imposition of a sentence.[7]

> ". . . In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified." *Williams v. New York,* supra, 337 U.S. 249.

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[6]See as an example **Raullerson v. People,** — Colo. —, 404 P. 2d 149, 158 (1965).

[7]It is also a sentence which accomplishes an end not fulfilled in the sentencing system of every jurisdiction. In that regard, the following comment is pertinent:

'Our federal machinery is not adequate to achieve the second objective of the Model Sentencing Bill — that is the identification of the dangerous offender and his incarceration for a long enough period to provide treatment and rehabilitation." 41 F.R.D. 249, 253.

It is, therefore, a type of sentence which accomplishes both desired ends — control, if required, and the opportunity of early freedom upon rehabilitation.

II.

THE PRINCIPAL POSITION OF PETITIONER IS THAT, UNLESS THE PANOPLY OF RIGHTS WHICH ATTACH TO A CIVIL COMMITMENT PROCEEDING ARE EXPLICITLY PROVIDED BY THE SENTENCING OF SEX OFFENDERS ACT, IT OFFENDS DUE PROCESS AND THEREFORE IS INVALID. THE STATEMENT OF THIS PROPOSITION CLEARLY ILLUSTRATES PETITIONER'S MISUNDERSTANDING OF THE ACT. IT DOES NOT PROVIDE A PROCEEDING TO COMMIT — IT ONLY AND SIMPLY PROVIDES FOR IMPOSITION OF A SENTENCE.

We have established what we consider to be the pivotal issue and its proper disposition — an issue and determination which obviously do not comport with petitioner's view. However, an analysis of his position and the bases therefor support our view. Petitioner's four arguments constitute two essential approaches, (1) substantive due process, and (2) procedural process. The procedural process attack is divided into two prongs, (1) a view that procedural due process requires a separate trial, to which the panolpy of due process attaches; and (2) even if a summary type of sentencing hearing is all that was required, "fair play" was not afforded to petitioner.

As we have discussed, neither of the procedural due process questions is properly before this court. The only question presented, argued and determined by the courts below is a question of substantive due process. No evidentiary hearing has been held before either a federal or state court to determine the nature of the hearing to im-

pose sentence, what rights were afforded, and if any rights which may be required were denied. We will, therefore, limit our response to petitioner's argument to the only question properly before the court, that is, one of substantive due process. Stated in another way, what rights must be explicitly guaranteed by a statutory provision providing for imposition of sentence to comport with the requirements of due process?

The petitioner's principal thesis is that the act is so unlike a sentencing procedure that it must be considered a separate criminal proceeding. Being a separate criminal proceeding, certain of the rights guaranteed by due process at a trial to determine one's guilt must attach. It is difficult to determine what is the nature of the hearing which petitioner asserts due process demands, and precisely what rights petitioner asserts attach.[8] For the sake of simplicity, we will address our argument solely to the question of whether the quality of due process which attaches to a hearing ot impose sentence is the measure of due process which attaches to a hearing to impose sentence under the Act, or whether due process requires the Act to explicitly provide additional guarantees.

Reducing petitioner's four arguments to essentials, it appears to us that there are two principal premises upon which petitioner supports his proposition that a hearing to impose sentence under the Act must be considered as a separate criminal proceeding. The first is that a potentially more stringent sentence may be imposed, and the second is that the imposition thereof is based upon a finding

[8]The nature of the rights which petitioner contends attach are described in various ways throughout his brief. One description would indicate one permissible type of hearing while another indicates a different permissible type. We will, therefore, not pursue this entanglement.

of fact by the trial court. Several subsidiary and corollary principles are expressed to buttress these two principal premises. They are (1) that a hearing held pursuant to the act is for the purpose of imposing sentence; (2) that the sentence imposed is potentially more severe or stringent than that which otherwise may be imposed; (3) that the determination made by the trial court to impose a sentence pursuant to the Act is a determination critical to the defendant; (4) that the Act permitting imposition of the sentence in accordance therewith is essentially punishment or in effect punitive; (5) that the determination of the trial court to impose sentence pursuant to the Act is distinct and separate from the determination of guilt; (6) that the determination to impose sentence is a finding of fact and not a discretionary decision; (7) that petitioner was entitled to a hearing under the Act which afforded him due process; (8) that the measure of the quality and nature of due process which is required is the panoply of rights which attach to a criminal trial or a civil commitment proceeding; (9) that the Act is invalid unless it explicitly by its terms guarantees the nature of due process which attaches to a civil commitment proceeding. As to most of the corollary theories, we are in substantial agreement.

It appears unnecessary to state the obvious, that the Act provides for the imposition of a sentence. It appears to us accepted by all that a sentence is to a lesser or greater degree punishment or punitive in nature.* To continue the reinstatement of the obvious, the alternative sentence provided by the Act, as to this petitioner, can be

*As we previously discussed, a sentence imposed pursuant to the Act is not essentially punishment. It is control, treatment and rehabilitation. We only make this statement in the sense that any loss of liberty, even a civil commitment, can be considered to some extent punitive in nature.

considered a greater loss of liberty than the alternative sentence provided by 40-2-32.[10] Imposition of sentence, so far as we are advised, is in every case a separate and distinct determination from the determination of guilt. It is likewise a determination in each case which is critical to the defendant. Pellucidly, a hearing to impose sentence must afford one with due process. Further, it requires only cursory review of the statute to determine that the Act does not explicitly require the panoply of due process attributes which attach to a civil commitment proceeding or criminal trial.

Therefore, the only essential area of dispute is whether the panoply or rights which attach to a civil commitment proceeding attach to a hearing to impose sentence and must be explicitly provided by the Act or offend due process. This is the area of dispute which crystallizes the question presented.

The petitioner's conclusion that a hearing to impose sentence pursuant to the Act must be considered a criminal proceeding separate and distinct from that which determined his guilt is, in our judgment, founded on fictitious and ephemeral bases. He discards the teachings of *Williams v. New York,* supra, on the sole premise that the New York trial court was not called upon to make a finding of fact and therefore the decision is inapposite. Apparently, then, it is petitioner's theory that, if Colorado eliminated the specification of classifications upon which a sentence may be imposed, *Williams* would be dispositive. It follows then that, if Colorado eliminated the specifica-

[10]It is not in every case a potentially longer period of custody. See 40-2-28 which provides upon conviction of first degree rape a sentence with a minimum of not less than three years and a maximum of up to life.

tion of standards and the imposition was within the plenary discretion of authority of the trial court, his argument would fall. However, since Colorado has included a specification of standards or classification, petitioner opines it is transformed into an entirely different proceeding than a hearing to impose sentence. The distinction is obviously one of form and not of substance. If petitioner's argument can be satisfied by the simple device of elimination of the standards, there can be no clearer illustration of the insubstantiality of petitioner's position. To this fictitious argument this Court's comment is apropos:

> "And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, *or if the judge had sentenced him to death giving no reason at all.* We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Williams v. New York,* supra, 337 U.S. 252. (Emphasis supplied).

Nor can it tenably be said that due process voids a sentence based upon a classification.

Critical to petitioner's argument is that the process by which a sentence pursuant to the Act is imposed is a "finding of fact." Petitioner belabors the development of the theory that the process by which sentence is imposed is a finding of fact and pours concrete from all directions to solidify and buttress this position — all for what purpose? Is it relevant to the determination of this case whether the process is characterized or labeled as a "find-

ing of fact," a "determination," or "in the discretion of the trial court"? It is irrelevant what label is attached to the thought process by which the court determines sentence. No matter what tag is attached, the nature of the decision remains the same — a determination as to what sentence is imposed.[11]

In Colorado, numerous "findings of fact" may be required in imposing sentence. Whether the place of incarceration is the state penitentiary or the state reformatory depends upon a determination of age.[12] Eligibility for probation depends upon a determination that one has not twice before been convicted of a felony.[13] All sentences require a determination that facts and circumstances exist which require a lesser or greater sentence. Apparently, petitioner is asserting that, if a sentence is imposed unrelated to facts and circumstances, any sentence, no matter whether it be death, life imprisonment, or one day, is permitted by due process. By this argument he contends for a capricious imposition of sentence. Of course, Colorado neither contends for nor supports such a sentencing process. Whether standards are specified by the legislature or not, we contend for and support only sentences which are founded upon an exercise of sound discretion — a sound discretion based upon a determination that facts exist which support the imposition of a greater or lesser sentence, whichever imposed.[14]

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[11]For further discussion see Note 3.

[12]See as example 40-5-1(3).

[13]39-16-3.

[14]Modern jurists have agreed on the need for broad discretion in the sentencing procedure. Common to the expression of such a need is that of the Honorable James Benton Parsons, United States District Judge, who addressed the Institute on Sentencing for United States District Judges, 35 F.R.D. 381, 423. Judge Parsons opines that wise sentences are founded upon a sound sentencing philosophy which is

Petitioner tangentially attacks the validity of the sentence in that (1) it can be considered punishment for mental illness; (2) the specification of standards in the Act may be vague; (3) it may be considered as increased punishment based upon past conduct; and (4) one may receive a greater sentence than another convicted of the same crime. He raises these points, even though admitting that they were not raised or considered by the court below or contained in the question presented in his petition for certiorari.

In response seriatim, commitment is not based upon mental illness, but conviction for commission of a criminal act. The classification is to a large extent empirical. There exists no scientific classification of the mental abnormality which results in the commission of sex crimes.[18] Thereby the classification of "an habitual offender and mentally ill" is required. What more rational and workable standard can be specified than one with an intellectual defect which has established a pattern resulting

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[16] (Continued)
exercised within a framework of broad judicial discretion employing the varied aids which are available to the sentencing court. According to Judge Parsons, such aids include an examination of the defendant by the court; the statements of counsel on both sides on the question of aggravation or mitigation and their recommendations for a proper sentence; the recommendation of the court's "investigative agent"; and the statements of the defendant himself. For a further discussion of the value and use of extra judicial information in the determination of a proper sentence see: 30 F.R.D. 483; 40 F.R.D. 433; and Note, 74 Yale L.J. 379.

[17] The sex offender is often found to be a psychopathic personality, i.e., one who fails to learn from experience. Because of the frequency of relapse in such cases, there is a need for prolonged control. Where recidivism may in part result from some mental abberation, there is a marked unlikelihood of the rehabilitation of the sexual psychopath within the framework of ordinary penology. Therefore, the orthodox system of sentence and parole does not satisfy the need created by this class of criminal offender. Nor can punishment alone be considered the penultimate in dealing with a case of this nature. Cf. The Legal Disposition of the Sexual Psychopath. 96 U.Penn. L. R. 672; and note, 37 Mich. L.R. 613.

in commission of sex crimes and obvious propensity of continuation thereof. What more rational standard for greater control and need for rehabilitation is "constitutes a threat of bodily harm to members of the public"?[16] Past conduct is not the basis of commitment, but a factor in determining an appropriate sentence. Such is a universally accepted factor in determining sentence.[17]

As to the last point: "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, supra, 337 U.S. 247.

By continued repetition, petitioner attempts to imbue credibility to the theory that, if an alternative sentence is provided by a separate statutory provision, it must be considered a separate criminal proceeding. What force commands that a provision providing a sentence must be contained in the same statutory provision which defines the corpus delicti of a crime? Apparently, petitioner contends that, if the alternative sentence were a part of 40-2-32, his argument would be completely satisfied and no question of due process would arise. In other words, petitioner's contention evaporates by the simple device of the state legislature amending 40-2-32 to provide an alternative sentence of a one-day minimum to a maximum of life.

Petitioner's attempt to confuse and obviscate the pivotal question presented is further compounded by the citation and reliance on decisions concerning statutory proceedings providing for civil commitment of sex psycho-

[16]See Appendix "B".

[17]See Williams v. Oklahoma, supra, and annot., 96 ALR 2d. 768, 780.

paths. As can be seen by review of the statutes of the respective states, basically three statutory schemes are expressed.[18]

Two statutory schemes are "sex psychopath" statutes providing for the civil commitment of sex psychopathics. One is of the type considered by this Court in *Minnesota ex rel Pearson v. Probate Court,* 309 U.S. 270, 84 L.ed. 744, 60 S. Ct. 523 (1940). The other is the California type procedure. The latter operates upon petition after conviction of a sex crime. If civil commitment is ordered, the sentence is suspended. When rehabilitation is effected, the defendant is remanded to the court for execution of his sentence. It is a procedure which on its face appears contradictory and self-defeating.[19] However, the choice is a question of choice of alternatives addressed to the legislature. "But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution, require a state to fix or impose any particular penalty for any crime it may define. * * *" *Williams v. Oklahoma,* supra, 358 U.S. 586. The third type is not a "sex psychopath" statute, but is a sentencing provision, i.e. Colorado, Pennsylvania and Oregon.[20] Conviction of a

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[18]See annot. 24 ALR 2d 350.

[19]In this regard, the statement of critics of the California law is pertinent:

> "The law attempts the contradictory and mutually exclusive elements of punishment and treatment. This absurdity culminates in the faulty timing of first attempting psychopathic cure and improvement, although under most unfavorable circumstances, and then proceeding with punishment. If the punishment has to be retained at all costs, it would seem to make more sense first to punish and then to proceed with the cure."
> 43 Calif. Law Rev. 766, 777

[20]Apparently the label of "sexual psychopath statute" has become a reference of art. There are two different methods presently employed in dealing with the sex oriented psychopathic criminal. While the majority of the states have followed a civil commitment method, Colorado, Pennsylvania and Oregon have adopted the sentencing pro-

crime of the type designated by the Act is the basis of commitment. The only question remaining is what sentence to impose.

Upon analysis, petitioner's contentions and bases therefor are bereft of substance. His attempt to create a separate proceeding when one doesn't exist is based upon form and not substance.

CONCLUSION

No more succinct, precise and poignant summation can be formulated in words and phrases than the conclusion of the court below:

> "We uphold the constitutionality of the act and agree with the reasoning of the Wisconsin court in State v. Haas, supra, that petitioner was 'afforded all the rights of due process at the time of the trial. He (was) afforded the right to be heard by himself and counsel, to be advised of the nature of the charge against him, to meet the witnesses face to face and compel the attendance of witnesses in his own behalf, and to a speedy trial by an impartial jury. But upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime * * *.'
>
> " 'There are sound practical reasons', says Mr. Justice Black, 'for different evidentiary rules governing trial and sentencing procedures * * *.' Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337. In determining whether a con-

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[20] (Continued)
cedure attendant to the conviction of certain offenses to provide a method of enlightened treatment of sex offenders. It is notable that of the two types of statutes, only the former have come to be known as "sexual psychopathic statutes." See annot. 24 ALR 2d 350.

victed person shall receive an indeterminate sentence based upon a recognized classification or a ten year maximum sentence, the sentencing court is free to utilize investigational techniques unhampered by due process requirements. 'The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts — state and federal — from making progressive efforts to improve the administration of criminal justice.' Williams v. People of State of New York, supra; * * *." *Specht v. Patterson*, 10 Cir., 357 F.2d 325 (1966), pp. 326 and 327.

The judgment of the Circuit Court must be affirmed.

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Appendix "A"

Note 3.

We are mindful that the Colorado Supreme Court characterized the process by which sentence is imposed as "a finding of fact" in *Vanderhoof v. People,* 152 Colo. 147, 380 P.2d 903 (1963). The nature of the process by which sentence is imposed was not addressed to the court in *Vanderhoof* and the aforementioned comment was obiter dictum.

If a label must be affixed to the thought process which results in imposition of sentence, the appropriate characterization is "in the discretion of the court." This is the language of the statute. See 39-19-2(1). In *Hawkins v. People,* 131 Colo. 281. 281 P.2d 156 (1955), the court stated:

> ". . . The statute further provides, in substance, that *if, in the discretion of the trial court,* it is of the opinion that an offender falls within the class above described, the said sentence of one day to life shall not be entered until a complete psychiatric examination shall have been made of said defendant. *The court has dicretion to order such examination, or to impose the penalty* as directed by the statute which defines the offense. The record in this case fails to disclose any abuse of this discretion and no error was committed in this connection." (Emphasis supplied.) 281 P.2d 158.

Further is the statement of the Court in *Trueblood v. Tinsley,* 148 Colo. 503, 366 P.2d 655 (1961):

> "The trial court should consider all material matter before it which will aid in the formation of a proper

> *'opinion'*. Without detailing the matters *considered*, we merely say that information supplied to the court from the probation report and other sources supported its disposition of the case." (Emphasis supplied.) 366 P.2d 657.

In *Trueblood v. Tinsley*, 10th Cir., 316 F.2d 783 (1963), the Circuit Court stated at page 785:

> "The act vests in the court, after the psychiatric examination has been made and the report thereof filed, *power to determine* whether sentence should be imposed under such act. Trueblood v. Tinsley, supra. *The court made that determination*, and we fail to find any substainable basis for the contention that imposition of the sentence violated any rights of petitioner under the Fourteenth Amendment." (Emphasis supplied.)

Also apropos is the court's statement in *Sutton v. People*, 156 Colo. 201, 397 P.2d 746 (1964) at page 747 (P.2d):

> "As to defendant's second contention that the trial court erred in sentencing him under C.R.S. '53, 39-19-1, when he pleaded guilty to C.R.S. '53, 40-2-32, he overlooks that these statutes are in *pari materia* and must be interpreted together. So reading them, it becomes readily apparent that an offender under 40-2-32 may be sentenced in accordance with the provisions of 39-19-1' . . . *if the district court is of the opinion* that any such persons, if at large, constitutes a threat of bodily harm to members of the public . . . ,' and the latter finding was expressly and justifiably made in this case." (Emphasis supplied.)

See also the statement of the court in *Ray v. People*, ... Colo. ...., 415 P.2d 328 (1966) at page 330 (P.2d):

> "After being apprised of the information *it is the court which finally makes the determination* whether the person, if at large, would constitute a threat of bodily harm to a member of the public. We stated in Trueblood, supra, that 'The trial court should consider all material matter before it which will aid in the formation of a proper "opinion."' This we hold, the trial court did. The information supplied to the court from the psychiatrist's first report and from the probation report and from other sources, including defendant's own counsel, supported its disposition of the case." (Emphasis supplied.)

The latest relevant statement is by the Circuit Court as follows:

> "The Colorado Sex Offender Act, 39-19-2, provides in substance that no person convicted of a crime punishable *in the discretion of the court* under the Act shall be sentenced until a psychiatric examination has ben made and a report submitted to the court of all the facts and findings together with recommendations as to whether the convicted person is treatable under the provisions of the Act and whether he should be committed or could be adequately supervised on probation. The statute does not provide or contemplate any hearing *on the exercise of the discretion of the court* to impose sentence under the Act in lieu of sentence authorized under 40-2-32.
>
> On the constitutional issue the contention is to the effect that one convicted of a 40-2-32 offense is en-

titled to a due process hearing *on the exercise of the discretion committed to the sentencing court . . . .*" *Specht v. Patterson*, 10th Cir., 357 F.2d 325, 326. (Emphasis supplied.)

As in *Vanderhoof*, likewise in the cases cited, the question of what label is attached to the process by which sentence is imposed was not a specific issue. The essence of the sentencing process, however, no matter what characterization is attached, is a determination in the discretion of the trial court.

Appendix "B"

Note 5.

The recommendation of responsible officials is that a sound system includes standards and classifications to guide the sentencing process. Representative thereof is the following:

> "Finally, few sentencing codes set forth criteria for distinguishing between the occasional and the aggravated or repeated offender. A clear definition of the circumstances under which, for example, it is appropriate to impose capital punishment or an extended prison term or to grant probation would help guide sentencing judges."

> "The Model Penal Code also contains sentencing criteria, as does the Model Sentencing Act drafted by the Council of Judges of the National Council on Crime and Delinquency."

> "Both the model code and the model act seek to establish criteria identifying the persistent, habitual, or hardened criminal. Framing statutory sentencing

standards is a complicated and laborious undertaking on which there still is much work to be done. Standards for many sentencing decisions cannot yet be articulated. However, it is an undertaking of great importance, and continued experimentation is likely to produce valuable results."

"The Commission recommends:

States should reexamine the sentencing provisions of their penal codes with a view to simplifying the grading of offenses, and to removing mandatory minimum prison terms, long maximum prison terms, and ineligibility for probation and parole. In cases of persistent habitual offenders or dangerous criminals, judges should have express authority to impose extended prison terms. Sentencing codes should include criteria designed to help judges exercise their discretion in accordance with clearly stated standards."

THE CHALLENGE OF CRIME
IN A FREE SOCIETY

A Report by the President's Commission on Law Enforcement and Administration of Justice, pages 142 and 143.

Note 16.

Petitioner cites Swanson's article in 51 *Crim. Law C. and P.S.* 215 with reliance. While we would agree with the ideals and standards therein expressed when applied to the *civil* sexual psychopath commitment proceedings, we disagree that this citation is apropos to the instant case. It is nonetheless significant that the concepts therein expressed with respect to the standards of classification of persons who fall within the purview of the Act are wholly

consistent with our position. See the following comment at page 226:

> "Hence, the following points are submitted for consideration. The statutes should change the designation of condition to 'Sexually Dangerous Persons', the reader realizing of course that what the offender is called is not nearly so crucial as what class of persons the statute shall include. 'Sexually Dangerous Persons' would include *any* person reflecting the existence of a mental disorder or personality disturbance coupled with propensities to commit *any* kind of sex crime which physically threatens others. The term 'Sexually Dangerous Persons' would thus include only those persons constituting a physical threat to other persons, hence leaving the less harmful offenders (e.g., exhibitionists, voyeurs, frotteurs, and fetishists) who do not constitute such a threat, to be dealt with by different legislation."

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